

Supreme Court of the United States

OCTOBER TERM, 1945

No. 732



HOMER C. ZINK, Comptroller of the Treasury of
New Jersey, et al.,

*Petitioner and
Respondent-Appellee below.*

vs.

CITY OF JERSEY CITY, a municipal corporation
of New Jersey, et al.,

*Respondents and
Relators-Appellants below.*

Petition for Writ of Certiorari to the New Jersey Court of
Errors and Appeals, and Brief in Support Thereof.

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January 12, 1946

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*To the Honorable HARLAN F. STONE, Chief Justice of the
United States, and the Associate Justices of the
Supreme Court of the United States:*

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This cause involves but one issue—Did the New Jersey Court of Errors and Appeals violate the principles of a republican form of government when it undertook to assume power beyond that confided to it by the constitution

and laws of New Jersey in the instant case and did the unconstitutional acts of the said Court make its judgment subject to review and reversal under Article IV, section 4, of the United States Constitution? This question has never been decided.

There have been many cases stating that questions arising under the said Article IV, section 4, were political in nature and for Congress to determine. But in all of those cases the question was whether there had been a denial of a republican form of government. In none of those cases was a question similar to that contained in the instant inquiry where the present review is asked in support of an existing republican form of government. In none of those cases was there shown the need for the rule which we shall urge in this case. We believe that, if we are permitted to argue this matter, we shall demonstrate that our governmental system of checks and balances lacks an essential important element unless the rule advanced by the State of New Jersey here is found to be the law.

In the summer of 1944, certain defaulting railroad companies paid into the treasury of New Jersey a large amount of taxes and approximately \$15,276,000 in interest due by reason of the defaults. (T. pg. 3.) The State Comptroller immediately issued his warrants for payment of the amount of the taxes under authority of New Jersey Revised Statutes, sections 54:24-11 and 54:24-13. He refused to distribute the interest money because the said sections only appropriated the amount of the taxes (T. pg. 3) and it was doubtful whether there was a sufficient appropriation to satisfy Article IV, section VI, paragraph 2 of the New Jersey Constitution which provides:

“No money shall be drawn from the treasury except for appropriation made by law.”

Thereafter Chapters 4, 5 and 6 of the laws of 1945 were enacted, which sought to appropriate the interest money. A reading of the Acts shows clearly that the Legislature had proceeded on the premise that there had heretofore been no appropriation of such moneys. These acts and Chapter 34 passed later have been declared by the New Jersey Court of Errors and Appeals to be unconstitutional. With their action on this score, this petition has no quarrel. It is with powers asserted with reference to the old law that we are concerned in this application. We will proceed more expeditiously if we treat the matter as if the 1945 legislation had never existed.

The present judgment arose out of the respondent's application to the New Jersey Supreme Court for a Writ of Mandamus to compel the Comptroller to issue his warrant to the State treasurer for payment of the interest money under authority alleged to exist by reason of the said R. S. 54:24-11 and 13. The 1945 legislation was only incidentally touched upon as witness the prayer of the petition. (T. pg. 9.) The application was denied. (T. pg. 143.)

Upon dismissal of the rule by the New Jersey Supreme Court (T. pg. 143), the respondent, Jersey City, took an appeal to the New Jersey Court of Errors and Appeals. At the argument of the matter, your petitioner urged (1) Since the respondent by his action sought the determination of the question of whether there had been an adequate appropriation as required by law, this action constituted a suit against the State, which the Court was without jurisdiction to entertain, and (2) That there never had been an appropriation of the interest money and the Legislature alone was authorized to make an appropriation.

The New Jersey Court of Errors and Appeals proceeded to take jurisdiction of this suit against the State without any color of authority. In its opinion (T. pg. 153) it poses a question, the answer to which clearly requires the State to be a party. In such state of affairs, the Comptroller in

his official position was the alter ego of the State of New Jersey.

Loder vs. Baker, Arnold Co. (Sup. Ct. 1876), 39 N. J. L. 49;

Strobel Steel Construction Co. vs. State High Commission (N. J. Ct. of E. & A. 1938), 120 N. J. L. 298, 300.

The said Court proceeded thereafter to hold that an appropriation of taxes carried with it the interest collected thereon although there was no authority whatsoever to support such conclusion. By so doing the said Court has made an appropriation in violation of Article IV, section VI, paragraph 2, of the New Jersey Constitution. In both the above instances, the said Court violated Article III, section I, of the said Constitution.

The republican form of government as established in New Jersey provides in the said Article III for the distribution of the powers of government "into three distinct departments—the Legislative, the Executive, and the Judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as expressly provided." The said Court by its action in the instant case has clearly usurped the powers of the legislative branch. It has therefore interfered with the orderly working of that republican form of government which was set up under the guarantee of the Federal government as contained in Article IV, section 4, of the United States Constitution.

The State of New Jersey had no reason to anticipate that its highest Court would be guilty of such usurpation and argued below only the questions having to do with the New Jersey Constitution. As soon as the Court of Errors and Appeals had made its determination, the State immediately by a petition for re-argument, made a part of the transcript

solely to prove this point, called to the attention of the said Court our claim as to the unconstitutionality of its action. The re-argument having been denied, this petition is now being made.

The New Jersey Courts have shown no hesitancy in declaring acts of the Legislature unconstitutional. That is good, for therein do we check abuse of power by the Legislature. The said Courts have shown no hesitancy in enjoining unconstitutional acts by the Executive. And that is good, for thereby do we check our abuse of power by the Executive. We believe that upon review we will be able to show that only if the rule be adopted which we shall urge in this case can we have an effective check over unconstitutional acts on the part of the judiciary. We will urge that such unconstitutional acts do not constitute a denial of the republican form of government and so present questions for Congress to consider, but that such unconstitutional acts are an interference with the orderly working of an existing republican form of government and that such interference constitutes a justiciable controversy under the Constitution of the United States. We will urge that a guarantee of a republican form of government loses much of its effectiveness if one of the coordinate branches of that government can by its judgment commit an unconstitutional act that is not subject to review by any impartial, unbiased and disinterested umpire.

JURISDICTIONAL STATEMENT.

It is contended that this Court has jurisdiction to entertain the present petition under 28 U. S. C. A. 344 (b) in that certain rights, privileges and immunities afforded to the State of New Jersey by virtue of Article IV, section 4 of the United States Constitution have been abridged by the New Jersey Court of Errors and Appeals, which by the entry of judgment in the above cause has interfered with the orderly working of the republican form of government

which was established under the guarantee contained in the above mentioned section.

The party in interest is Homer C. Zink, Comptroller of the Treasury of New Jersey, as the alter ego of the State of New Jersey. *Strobel Steel Construction Co. vs. State Highway Commission, supra*. The petition is prosecuted for and on behalf of the said State which stands to lose upward of \$8,000,000 of its revenue by the unconstitutional action of its Court. (T. pg. 101.)

The question of the violation of the Federal Constitution was not raised until after the determination by the Court of Errors and Appeals because it could not be anticipated that the Court itself would be guilty of unconstitutional acts. We are not dealing with an error in judgment or with an abuse of discretion, matters that are voidable only if appeals are taken within the prescribed time and which would not here be reviewable because as such they would afford no federal question. We are dealing with usurpation—with a complete lack of jurisdiction in the Court below and a judgment that should be declared by this Court to be a nullity. If the action of the Court below would under any circumstance warrant review by this Court as a violation of any right incident to the protection contained in the said Article IV, section 4, then by analogy with the reasoning contained in *Ford Motor Co. vs. Indiana* (1945), 65 S. Ct. 347, the question could no doubt quite properly be raised here for the first time regardless of notice to the Court below.

In *William Cramp & Sons Ship & Engine Co. vs. International Curtis Marine Turbine Co.*, 228 U. S. 645, this Court allowed its writs to review a judgment of the Circuit Court of Appeals that was a nullity because of the disqualification of one of the judges below.

QUESTION PRESENTED.

Did the New Jersey Court of Errors and Appeals violate the principles of a republican form of government when it undertook to assume power beyond that confided to it by the constitution and laws of New Jersey in the instant case and did the unconstitutional acts of the said Court make its judgment subject to review and reversal as constituting a case in law or equity arising under Article IV, section 4, of the United States Constitution?

REASONS.

A substantial federal question has been presented which as far as we have been able to determine has never heretofore been presented. It is not urged that the New Jersey Court of Errors and Appeals has by its judgment attempted to deny to New Jersey a republican form of government, but that by its action it has refused to play its proper part in the orderly functioning of that government which was established by the people pursuant to the guarantee of the Federal Constitution as contained in Article IV, section 4.

A guarantee of a republican form of government loses much of its effectiveness if the highest Court of the guarantor is without power to assist in reviewing and reversing an unconstitutional judgment of the State's highest Court in a case where but for the intervention of the said Federal Court there is no other method of review. Impeachment of the offending judges is not an effective remedy because it goes to the punishment of men and not to the reversal of the judgment.

This country has just won its right to continue as a democracy in a conflict of shuddering proportions. But we came through because we had confidence in ourselves

and in our institutions. We have survived because we have demonstrated a virility in those institutions. And among those institutions, our system of law has shown consistent and healthy growth. We have been ever willing to accept innovations, to correct inconsistencies, and to develop a remedy where that remedy is needed.

We have in our governmental system an elaborate system of checks and balances. But within the State system there is one glaring weakness—the lack of an orderly method for review of an unconstitutional act of a State Court, committed under State law, in such a way as to strike at the offending judgment.

We urge, as a reason for the granting of the Writ, the great need for the Court to answer the question posed above in the affirmative. It would be a healthy development in our scheme of constitutional checks and balances. It is a development that could not help but build public confidence and lend prestige to our judicial system. The need being present, the Writ should go to enable the applicability of the proposed rule to the federal constitutional provision in question to be fully explored.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the New Jersey Court of Errors and Appeals, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Errors and Appeals had in the case numbered and entitled on its docket No. 14853, City of Jersey City, a municipal corporation of New Jersey, et al., Relators-Appellants vs. Homer C. Zink, Comptroller of the Treasury of New Jersey, et al., Respondents-Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Court of

Errors and Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

HOMER C. ZINK,
*Comptroller of the Treasury
of New Jersey.*

By: BENJAMIN C. VAN TINE,
Counsel for Petitioner.

WALTER D. VAN RIPER,
Attorney-General.

Dated: January 12, 1946.

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Brief in Support of Petition for Writ of Certiorari.

OPINIONS OF COURTS BELOW.

The opinion in the Supreme Court (T. pg. 141) is reported in 132 N. J. L. 601.

The majority opinion in the Court of Errors and Appeals (T. pg. 151) is reported in 133 N. J. L. 437.

The two minority opinions in the Court of Errors and Appeals (T. pg. 164, and T. pg. 167) are reported in 133 N. J. L. 451 and 133 N. J. L. 453.

JURISDICTION.

(1) The date of the judgment to be reviewed is November 29, 1945. An order was entered holding the remittitur pending the filing of a petition for a re-argument. Said petition was filed on December 13, 1945, and denied January 3, 1946. The Court of Errors and Appeals is under Article VI, section I, of the New Jersey Constitution, the Court of "last resort in all causes."

(2) The jurisdiction of this Court is invoked under section 237 of the judicial code. The State of New Jersey through its alter ego, Homer C. Zink, Comptroller of the Treasury of New Jersey, contends that certain rights, privileges and immunities incidental to the enjoyment of its government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution have been abridged by the unconstitutional judgment entered by the New Jersey Court of Errors and Appeals in the instant case.

(3) The petitioner directed the attention of the said Court of Errors and Appeals by petition for re-argument as soon as practicable after he had knowledge of the unconstitutional acts of the Court. The petition for re-argument is attached to the transcript for the sole purpose of showing such notice.

(4) The Court of Errors and Appeals by its judgment committed two unconstitutional acts either of which should make its judgment a nullity; (1) It undertook consideration of a cause against the State without the State's consent; and (2) It proceeded to make an appropriation of State revenues contrary to Article IV, section VI, paragraph 2, of the New Jersey Constitution. Unless this Court undertakes to review this judgment, there is no method for obtaining a review of the improper judgment and it thus becomes apparent that there is a fundamental weakness in our constitutional system of checks and balances. Since

a review by this Court would eliminate that weakness, the State of New Jersey urges that, as an incident to the full enjoyment and orderly functioning of the government established under the guarantee provided in Article IV, section 4, of the United States Constitution this Court should undertake the review of the judgment in the instant case and, if the contentions of the State are proved, reverse such judgment.

(5) We have been unable to find any case similar to the one presently before this Court.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition above (pp. 1-5), which we pray leave to adopt and make a part of this brief.

SPECIFICATIONS OF ERROR.

(1) The New Jersey Court of Errors and Appeals erred in undertaking to consider a cause against the State of New Jersey without its consent.

(2) The New Jersey Court of Errors and Appeals erred in attempting by its judgment to make an appropriation of State revenues in violation of Article IV, section VI, paragraph 2, of the New Jersey Constitution.

(3) By the above unconstitutional acts, the said Court has interfered with the orderly functioning of the government established in New Jersey pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution and by so doing has abridged certain rights, privileges, and immunities which are given to the said State by the federal government as an incident to its full enjoyment of the government so established.

ARGUMENT.

Summary of Argument.

POINT A. An independent judicial review of any unconstitutional acts of the New Jersey Court of Errors and Appeals is necessary if we are to maintain the integrity of the republican form of government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution.

SUB-POINT 1. The New Jersey Court of Errors and Appeals has by its unconstitutional action violated the principles of and interfered with the orderly working of the government which was established by the people of New Jersey pursuant to the guarantee contained in the said Article IV, section 4, of the United States Constitution.

SUB-POINT 2. Unless the unconstitutional acts of the said Court of Errors and Appeals are subject to review by this Court, the State of New Jersey is without an adequate and effective remedy and will suffer great harm.

POINT B. The Federal Government owes a positive duty to the State of New Jersey, as a necessary incident of the guarantee contained in Article IV, section 4, of the United States constitution, to protect the said State against any abuses arising out of the operation of the government established under its guidance and pursuant to such guarantee and not otherwise adequately provided against by the system of checks and balances contained therein.

POINT C. This Court should issue its writ to review the question whether by its unconstitutional acts the New Jersey Court of Errors and Appeals made its judgment subject to review by this Court.

POINT A.

An independent judicial review of any unconstitutional acts of the New Jersey Court of Errors and Appeals is necessary if we are to maintain the integrity of the republican form of government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution.

In considering the present application, we urge this Court that it is the State of New Jersey appearing through its alter ego, Homer C. Zink, Comptroller of the Treasury of New Jersey, which comes before this Court to invoke any right, privilege or immunity which may be owed to the said State by the federal government as an incident to the guarantee by the said federal government as contained in Article IV, section 4, of the United States Constitution.

This petition and argument has confined itself as closely as possible to a consideration of the reasons why the writ should issue in the instant case and to our contentions concerning jurisdiction. As to the actual merits of our claim of constitutional violations in the entry of judgment we point out that (1) it has always been the law in New Jersey that the State of New Jersey may not be sued without its consent, and (2) the Legislature is the only one authorized to make an appropriation of State funds.

As for the first, *Strobel Steel Construction Co. vs. State Highway Commission*, 120 N. J. L. 298, 198 Atl. 774 (E. & A. 1938), is controlling. In that case the Court said:

“Moreover it may be said to be a fundamental rule of construction that what is not clearly granted by the state is withheld and that statutes permitting suits against the state being in derogation of sovereignty, must be strictly construed.”

This is no different than the law as expounded by this Court in the recent cases of *Great Northern Life Insurance Co. vs. Read*, 322 U. S. 47, and *Ford Motor Co. vs. Dept. of*

Treasury of Indiana, 65 S. Ct. 347. What constitutes a suit against the government is clearly defined in the opinion of this Court in *Mine Safety Appliance Co. vs. Forrestal*, No. 71 of the October term, decided on December 10, 1945. The opinion in the instant case shows that the court sought to determine a disputed question as to the existence of an appropriation. The action thereupon became one against the State.

Second—we again call attention to Article IV, section VI, paragraph 2, of the New Jersey Constitution which provides:

“No money shall be drawn from the treasury except for appropriation made by law.”

and Article IV, section IV, paragraph 6, and Article V, section VII, concerning the method of enacting a law.

We assert that in both of the above respects, either of which would be sufficient to make the judgment in this case a nullity, the New Jersey Court of Errors and Appeals has committed unconstitutional acts.

Sub-Point 1.

The New Jersey Court of Errors and Appeals has by its unconstitutional action violated the principles of and interfered with the orderly working of the government which was established by the people of New Jersey pursuant to the guarantee contained in the said Article IV, section 4, of the United States Constitution.

The State of New Jersey adopted its present Constitution in 1844. At this late date, we need no proof that it is republican in form and conforms to the government prescribed by Article IV, section 4, of the Federal Constitution.

Article III, section 1, provides:

“The powers of government shall be divided into three distinct departments—the Legislative, Executive, and

Judicial, and no person or persons belonging to or constituting one of these departments, shall exercise any of the powers belonging to either of the others, except as herein expressly provided."

The cases cited above show clearly that the granting of permission to sue the State is a legislative function. The law is clear that appropriations may be made only by the Legislature. When the Court of Errors and Appeals of New Jersey erred on both or either of these scores it violated the principles of the republican form of government as expressed in the said Article III and thereby interfered with the orderly working of a government which was established by the people of New Jersey pursuant to the guarantee contained in the United States Constitution.

Sub-Point 2.

Unless the unconstitutional acts of the said Court of Errors and Appeals are subject to review by this Court, the State of New Jersey is without an adequate and effective remedy and will suffer great harm.

As pointed out above, the New Jersey Courts have shown no hesitancy in declaring an act of the Legislature unconstitutional. That is a proper judicial function and curbs an abuse of power by the Legislature. Those Courts have shown no hesitancy in restraining unconstitutional acts of the executive branch—a further proper and healthy judicial function which tends to curb the abuse of power by the Executive. But nowhere in our constitutional scheme of checks and balances do we have a similar curb on the judiciary unless we can find it within the powers of this Court.

Cooley on "Constitutional Limitations" said on page 91 that the

"legislative department has an important restraint upon both the executive and the judiciary in the power of impeachment for illegal or oppressive action. * * *"

The New Jersey Constitution contains an impeachment provision. But impeachment is not an adequate or effective remedy because it goes not toward a correction of the offending judgment but to punishment of men. Also it might be well to observe, that when the unconstitutional conduct of the Executive is complained of, the Court does not suggest that the wronged person resort to impeachment. The Court restrains the wrongful act.

As has been pointed out, the State of New Jersey stands to lose upward of \$8,000,000 as a result of the present judgment. Since there is no other adequate and effective remedy contained within the government established pursuant to the federal guarantee, the State of New Jersey stands to suffer great harm unless a review is given by this Court under powers contained within the United States Constitution.

We submit that an independent judicial review of any unconstitutional acts of the New Jersey Court of Errors and Appeals is necessary if we are to enjoy an orderly and effective operation of the republican form of government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution. We urge that such review may be had in this Court as a necessary incident of the guarantee contained in the said Article and to prevent a usurpation of power or interference with the orderly working of the government thereby guaranteed. We urge that the New Jersey Court of Errors and Appeals has violated those incidental rights, privileges or immunities in the instant case and so is reviewable by this Court.

POINT B.

The Federal Government owes a positive duty to the State of New Jersey, as a necessary incident of the guarantee contained in Article IV, section 4, of the United States Constitution, to protect the said State against any abuses arising out of the operation of the government established under its guidance and pursuant to such guarantee and not otherwise adequately provided against by the system of checks and balances contained therein.

The Federal Government by the clause in question has advocated the type of government presently in effect in the State of New Jersey. Before it can exercise its powers, Congress must know what government is established. *Luther vs. Borden*, 7 How. 42.

There have been many cases considered by this Court under this section of the Constitution. As far as we can learn there has not been a case similar to the one presently before this Court. Almost invariably the question has been whether some statute was inconsistent with the republican form of government—was in effect a denial of that form of government or whether one or the other of two governments was the lawful government. *Texas vs. White*, 7 Wallace 700; *Luther vs. Borden*, 7 Howard 1; *Minor vs. Happersett*, 21 Wallace 162; and *Pacific States T. & T. Co. vs. Oregon*, 223 U. S. 118, are representative of such cases. There is no doubt that the law of those cases is that questions arising under Article IV, section 4, are political and for Congress to determine. The principle is clearly stated in *Highland Farms Dairy Co. vs. Agnew*, 300 U. S. 608-612, wherein Mr. Justice Cardozo, said for this Court.

“How power shall be distributed by a state among its governmental organs is commonly, if not always a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution Art. 4, par. 4. Even if it were, the enforcement of that guarantee according to settled doctrine, is for Congress, not the Courts.”

It is interesting to note that in every instance there was an adequate remedy in the State courts to review the statute or action complained against. In not one of those cases was there shown the necessity of bringing the case within the jurisdiction of this Court in order to afford a remedy to a State which would otherwise have no forum within which to seek a redress of its wrongs occasioned by the unconstitutional acts of its highest Court.

We have not asserted and we do not now assert that the New Jersey Court of Errors and Appeals has attempted by its action to set up another form of government. But we do say that, since the people have established their republican form of government and since a usurpation by said Court has interfered with the working of that constitutionally established government, a federal question has arisen under Article IV, section 4, of the United States Constitution. Otherwise there is a fundamental weakness in our governmental set up that is not at all cured by the power of impeachment. It is inconceivable that the framers of our Constitution who knew abuse of power and who so jealously guarded against such abuse, could have intended such deficiency.

Alexander Hamilton said in discussing Article IV, section 4, in the Federalist No. XXI:

“A guaranty by the national authority would be as much leveled against the usurpation of rulers as against ferments and outrages of faction and sedition in the community.”

A study of the conditions existing during the critical period of the American Revolution must lead us to the conclusion that there was intended to be included within the system of constitutional checks and balances afforded by our dual system, an adequate remedy for the situation complained of in the instant case.

We again submit that a "guarantee of a republican form of government" loses much of its effectiveness if, when such government has been established, an abuse of power by the highest Court of a State may not be judicially reviewed, particularly in a case like the instant case where no other effective means of review is provided by our governmental set-up. In the interest of orderly judicial review—and so that there may be an independent effective review, at the instance of the people of a State, of a usurpation of power by the judiciary, it should be held that this case comes within the meaning of Article IV, section 4, and that under such section the State is possessed of certain rights and privileges incidental to the guarantee contained in the said Article. We respectfully submit that the Federal government owes that protection to the State as an incident of the said guarantee.

POINT C.

This Court should issue its writ to review the question whether by its unconstitutional acts the New Jersey Court of Errors and Appeals made its judgment subject to review by this Court.

We have tried to show that unless it is ultimately found that the judgment below is subject to review in this Court, the State of New Jersey is without a remedy against a threatened wrong. But regardless of whether this Court should ultimately so hold, we respectfully submit that we have sufficiently raised a federal question to warrant this Court in issuing its writ if in its wisdom it should find the question to be of sufficient importance to warrant the time of a very busy Court. We believe that, regardless of the many cases stating that the denial of a republican form of government is a political question and for Congress to determine, the State was, as an incident of the guarantee of a republican form of government, possessed of certain incidental rights and privileges under Article IV, section 4, that are applicable in the instant case and that for this

reason there has been presented a case in law or equity arising under the United States Constitution as required by Article III, section II, of that instrument.

We call attention to one further case arising under the said Article IV, section 4, *Marshall vs. Dye*, 231 U. S. 250, 34 S. Ct. 92. In that case the question was the constitutionality of a statute providing for a new constitution. The State Court held the act to be unconstitutional. Members of the election commission took an appeal to this Court. The Court said at page 94:

“ ‘We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision!’ ”

In that case the State Court acting within the limits of its constitutional authority passed upon the question. Its judgment was valid and binding. In our case the acts of the Court were unconstitutional and its judgment a nullity.

The Court said further on the same page:

“ ‘That the act of the state is charged to be in violation of the national Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in and affected adversely by the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official, nature.’ ”

In the case cited by the Court, the party pressing the appeal had no interest in the subject matter. He sought to act for those whose taxes would be affected. We are not in that position. If we are right in our contention, the State of

New Jersey stands to lose many millions of dollars by the wrongful act of the Court of Errors and Appeals. The petitioner in this case is the State of New Jersey, acting through its alter ego, its duly elected Comptroller.

But again the *Marshall* case, and the *Braxton County* case cited therein, are not controlling for the reasons that they do not involve a situation where a State Court has violated the provisions of the Constitution which each member has sworn to uphold.

The remedy here suggested by the State of New Jersey would be good for our judicial system. It would be good for our governmental system of checks and balances. It is in keeping with that spirit of development and growth ever apparent in our federal judicial system. And it will fill a very urgent need.

We do not need to hesitate because it has taken so long to develop that rule. This Court in *United States vs. South-Eastern Underwriters Association*, 322 U. S. 833, 64 S. Ct. 1162, did not hesitate to rule adversely on a question which the members of the bar had deemed to be a fixed and certain precedent for very many years. And so with other developments under the commerce clause, the due process clause and other portions of our Federal Constitution made necessary by our changing economy and needs of the times. In a system of law that has proved its adaptability under such conditions, we must be able to find a satisfactory solution to the problem posed by the instant case. We respectfully submit that the writ should issue to determine whether or not there has lain dormant and unused all these years a power in this Court to review an unconstitutional usurpation of power by a State's highest court for the purpose of redressing a wrong done by such unlawful act. It is seemly that the highest Court of our land should undertake such review. If there be in fact a wrong this is the logical forum for redress. And in our approach to the present inquiry, we should assume the basic premise that usurpa-

tion of power by the judiciary may not be countenanced but should be resisted with the full force of our vigor.

In conclusion we respectfully urge that the Federal government owes a duty to the State of New Jersey to lend its aid in eliminating any fundamental weakness that exists and is basically inherent in the system of government that is prescribed and guaranteed by Article IV, section 4, of the United States Constitution. This Court can and we respectfully request this Court to undertake the performance of that duty. Any rule appropriate to the occasion would be circumscribed within very narrow limits. Unconstitutionality—usurpation must be conclusively proved. But once proved, we respectfully submit that this Court may act in order to prevent such usurpation.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

BENJAMIN C. VAN TINE,
Counsel for Petitioner.

WALTER D. VAN RIPER,
Attorney-General,
Of Counsel.

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FILED

JAN 17 1946

CHARLES ELMORE CROFT

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1945.

No. 737

HOMER C. ZINK, Comptroller of the Treasury of New
Jersey, et al,

*Petitioner and
Respondent-Appellee below,*

vs.

CITY OF JERSEY CITY, a municipal corporation of
New Jersey, et al,

*Respondents and
Relators-Appellants below.*

On Petition for Certiorari to the Court of Errors and
Appeals of New Jersey.

**BRIEF ON BEHALF OF THE CITY OF JERSEY
CITY IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945.

No.

HOMER C. ZINK, Comptroller of the Treasury of New
Jersey, et al,

*Petitioner and
Respondent-Appellee below,*

vs.

CITY OF JERSEY CITY, a municipal corporation of
New Jersey, et al,

*Respondents and
Relators-Appellants below.*

On Petition for Certiorari to the Court of Errors and
Appeals of New Jersey.

**BRIEF ON BEHALF OF THE CITY OF JERSEY
CITY IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

Statement of the Case.

In July, 1944, there was paid into the treasury of the State of New Jersey by certain railroad company taxpayers the sum of \$15,276,373.93 (T., p. 51, l. 31), representing statutory interest on unpaid taxes assessed against them by the State of New Jersey for the years 1932 to 1940, inclusive. The City of Jersey City and certain other municipalities in New

Jersey, statutory distributees of a part of the taxes, made demand upon the petitioner herein, Homer C. Zink, Comptroller of the Treasury of New Jersey, to issue his warrant upon the State Treasury for the distribution of \$8,076,047.60 of such collected tax interest to them, asserting that it was his ministerial statutory duty so to do under New Jersey R. S. 54:24-11 and 54:24-13. The said Zink refused so to do on the ground that he did not construe the said statute to constitute an appropriation to such municipalities of interest on railroad tax arrears.

Early in 1945 the New Jersey Legislature enacted Chapters 4, 5, 6 and 34 of the Laws of 1945, under which the municipalities of the state to which railroad taxes were distributable would have been entitled only to \$3,301,539.94 of the aforementioned sum of interest, as interest, (T., p. 101, Column (A)), the remainder being made distributable for miscellaneous other state and local purposes. Thereupon, the City of Jersey City and certain other municipalities, together with individual taxpayers in said municipalities, applied to the New Jersey Supreme Court for a writ of mandamus, commanding the said Zink, as State Comptroller, to distribute the aforementioned \$8,076,047.60 to the municipalities entitled thereto, as required by R. S. 54:24-11 and 54:24-13, asserting that the 1945 laws were in contravention of the Constitution of the State of New Jersey, as special and local legislation, violative of Article IV, Section 7, Paragraph 11 thereof. The New Jersey Supreme Court entered judgment denying the application (T., p. 143). *Jersey City v. Zink*, 132 N. J. L. 601.

Upon appeal by the City of Jersey City and the other applicants for the writ to the New Jersey Court of Errors and Appeals, the judgment of the Supreme Court was reversed and judgment of mandamus ordered entered, com-

manding the Comptroller forthwith to make the distribution requested. The opinion of the New Jersey Court of Errors and Appeals is summarized by it in its own syllabus, *Jersey City v. Zink*, 133 N. J. L. 437, which reads as follows:

"1. *Mandamus* is the proper remedy to compel a state officer to perform a ministerial duty.

"2. Such a proceeding is not a suit against the state.

"3. Under R. S. 54:27-4, as construed in *Wilentz v. Hendrickson*, 135 N. J. Eq. 244, the interest for delinquency in tax payments follows the principal as an integral part thereof, constituting the tax debt and is distributable under R. S. 54:24-11 and 13.

"4. Chapters 4, 5, 6 and 34, Pamph. L. 1945, held unconstitutional, being discriminatory and special enactments regulating the internal affairs of towns and counties in violation of article IV, section 7, paragraph 11 of the state constitution."

Thereupon, petitioner Zink filed a petition with the Court of Errors and Appeals for a rehearing, alleging, for the first time, that the determination of the Court constituted a denial to the State of New Jersey of a republican form of government as guaranteed to the several states by Article IV, Section 4, of the United States Constitution. The petition for rehearing was denied by the Court of Errors and Appeals on January 3, 1946. The remittitur of the court has been stayed pending disposition of the present application.

Summary of Argument.

I. There is no jurisdiction in this Court under Section 237 of the Judicial Code to review the judgment of the New Jersey Court of Errors and Appeals by certiorari, no federal question having been raised below.

II. No federal constitutional right is asserted by the petitioner.

III. The assertion of rights under Article IV, Section 4, of the United States Constitution is an improper basis for an application for certiorari to review the judgment of the highest court of the state.

IV. The petitioner Zink asserts no personal, as distinguished from official, rights which can warrant his invocation of review by this Court of the judgment of the New Jersey Court of Errors and Appeals.

Argument.

I.

There is no jurisdiction in this court under Section 237 of the Judicial Code to review the judgment of the New Jersey Court of Errors and Appeals by certiorari, no federal question having been raised below.

Petitioner assigns Section 237 of the Judicial Code (28 U. S. C. A. 344(b)) as the jurisdictional basis for the review sought herein (Petition, p. 5). He asserts that that section confers jurisdiction by certiorari in that "certain rights, privileges and immunities afforded to the State of New Jersey by virtue of Article IV, Section 4, of the United States Constitution, have been abridged by the New Jersey Court of Errors and Appeals. * * *" (*Id.*). He concedes no federal question was raised in the cause below other than in the petition for rehearing after the judgment below was entered. In such case Judicial Code, Section 237(b), does not, on its face, apply to confer jurisdiction upon this Court. The statute permits the issuance of certiorari by this Court only—

"* * * in a cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. . . ."

No federal claim having been presented to the New Jersey courts at any point in the proceedings below, Section 237(b) is, by its express provisions, not applicable to confer jurisdiction upon this Court.

The United States Supreme Court has held that these provisions mean exactly what they say, and that where no federal question has been raised in a state court litigation, the Supreme Court is absolutely without jurisdiction.

Hulbert v. Chicago, 202 U. S. 75;

Cox v. Texas, 202 U. S. 446;

Adams v. Russell, 229 U. S. 353.

Petitioner's attempt to overcome this difficulty upon the ground that he could not foresee the impairment of the alleged federal constitutional right until the Court of Errors and Appeals had rendered its decision, is both immaterial and unfounded. Petitioner's assertion that rights of the State of New Jersey under Article IV, Paragraph 4, of the United States Constitution have been infringed, is based upon the allegation that the New Jersey court, in effect, held that the State of New Jersey could be sued without its consent and that the court might assume to appropriate moneys of the State of New Jersey in the place of the legislature. (The syllabus of the opinion of the court, and the opinion itself, plainly shows that the court held neither of these propositions). But petitioner well knew he had raised before the New Jersey courts the contentions that an allowance of the writ would constitute both the entertainment of a suit against the state without its consent, and the distribution of moneys out of the state treasury not appropriated by the state legislature. He also knew that the applicants for the writ of mandamus were contending that their application was not a suit against the

state, but merely the appropriate remedy to compel a state officer to perform a ministerial duty, and that the legislature of New Jersey had appropriated the railroad tax interest moneys to the municipalities under R. S. 54:24-11 and 13. He certainly cannot now be heard to say that he could not contemplate the possibility of the Court resolving those issues in favor of the applicants for the writ and against himself, as respondent below, and yet, that is the absurd position here taken.

The alleged federal question now raised was obviously an after-thought of the petitioner, conceived solely for the purpose of continuing the litigation below in this Court.

It appears, moreover, that, petitioner does not even now raise the precise federal question presented by him in the application for rehearing to the New Jersey Court of Errors and Appeals. There he urged that the decision of the Court *denied* to New Jersey a republican form of government, guaranteed by the United States to the several states by Article IV, Section 4 of the United States Constitution. Here, on the contrary, as fully shown in the next Point herein, he expressly disclaims that position and argues, instead, that the decision below is "an interference with the orderly working of an *existing republican form of government* * * *" (Petition, pp. 2, 5). That particular contention was never made below at any time whatever, even in the petition for rehearing.

No federal question having been raised in the litigation below, Section 237 of the Judicial Code, as heretofore repeatedly construed by this Court, affords no jurisdiction for the issuance of the writ of certiorari requested.

II.

No Federal Constitutional right is asserted by the petitioner.

The petition herein refers to Article IV, Section 4, of the Constitution of the United States, as the basis for the present application (Petition, p. 4). That provision reads as follows:

“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; * * * .”

But petitioner now, contrary to the express position taken by him in the petition for rehearing before the Court of Errors and Appeals, expressly disclaims the position that the action of the New Jersey Court of Errors and Appeals constitutes a denial of the republican *form* of government to New Jersey (Petition, p. 5). He here asserts that he does not contend that there has been a denial of the republican form of government, but that “the present review is asked in support of an existing republican form of government” (Petition, p. 2), and that the alleged unconstitutional action of the New Jersey court is “an interference with the orderly working of an existing republican form of government * * * .”

Article IV, Section 4 guarantees the *existence* of a republican *form* of government to each of the states, not the “orderly working” thereof. Since Article IV, Section 4, of the United States Constitution is the only federal constitutional or statutory provision adduced by petitioner as the basis for his claim of impairment of a federal right, and since he expressly concedes that the State of New

Jersey continues to enjoy a republican form of government, notwithstanding the asserted objectionable decision of the New Jersey Court of Errors and Appeals, the petition necessarily presents nothing which is cognizable by this Court as a basis for review of the judgment of the highest court of New Jersey.

III.

The assertion of rights under Article IV, Section 4, of the United States Constitution is an improper basis for an application for certiorari to review the judgment of the highest Court of the state.

If, despite the express disclaimer by petitioner of any denial of the republican form of government in New Jersey by the decision complained of, it could nevertheless be considered that in some vague way petitioner is invoking the provisions of Article IV, Section 4, as the basis for the present application, a writ could nevertheless not issue. It is thoroughly and incontestibly laid down by the decisions of this Court that the Court has no jurisdiction to adjudicate that state action of any nature violates the federal constitutional guaranty to the states of a republican form of government. As is recognized by petitioner, it is now settled beyond question that the guaranty by the United States to the several states of a republican form of government, under Article IV, Section 4, is for enforcement exclusively by Congress and not the courts. The rule was restated by Mr. Justice Cardozo in *Highland Farms Dairy v. Agnew*, 300 U. S. 608, where a state statute was attacked as violative of the guaranty. In stating that the United States Supreme Court had no jurisdiction to entertain the controversy, the Court said (p. 612):

“How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. 4, Sec. 4. Even if it were, the enforcement of that guaranty, according to the settled doctrine, is for Congress, not the courts. *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224; *Ohio ex rel. Davis v. Hildebrandt*, 241 U. S. 565, 60 L. ed. 1172, 36 S. Ct. 708; *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U. S. 74, 79, 80, 74 L. ed. 710, 715, 716, 50 S. Ct. 228, 66 A. L. R. 1460.”

The question as to whether the guaranty has been violated by state action in a particular case has been specifically held not to constitute a judicial question, but only a political question committed solely to the Congress of the United States. In *Mountain Timber Co. v. Washington*, 243 U. S. 218, 234, the Court said:

“Two of the constitutional objections may be disposed of briefly. It is urged that the law violates Sec. 4 of article 4 of the Constitution of the United States, guaranteeing to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated *is not a judicial but a political question*, committed to Congress, and not to the courts. *Luther v. Borden*, 7 How. 1, 39, 42, 12 L. ed. 581, 597, 599; *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kiernan v. Portland*, 223 U. S. 151, 56 L. ed. 377, 32 Sup. Ct. Rep. 231; *Marshall v. Dye*, 231 U. S. 250, 256, L. ed. 206, 207, 34 Sup. Ct. Rep. 92; *Ohio ex rel. Davis v. Hildebrandt*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708.”

The attempted escape from this rule asserted in the petition, that here the impairment of the "orderly working" of a republican form of government is by state court, rather than state legislative action, is patently frivolous. What possible difference can it make, if the guaranty is a political one, committed solely to Congress for enforcement and not to the courts, whether the state action complained of is by the judiciary rather than the legislature?

That the negation of jurisdiction in the United States Supreme Court, under Article IV, Section 4, is not confined to cases of objection to actions of a state legislature, is indicated by the case of *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, where the same rule as stated above was applied where the contention was that a state constitutional provision constituted a deprivation of the republican form of government in a state. The state constitutional provision there in question provided that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence by at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." The United States Supreme Court held:

"As to the guaranty to every state of a republican form of government (sec. 4, art. 4), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress, and not the courts. *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *O'Neill v. Leamer*, 239 U. S. 244, 248, 60 L. ed. 249, 263, 36 Sup. Ct. Rep. 54; *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 234, 61 L. ed. 685, 694, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917 D, 642, 13 N. C. C. A. 927."

The reason for the non-existence of any United States Supreme Court decision applying the rule in the case of a claimed assertion that the action of a state court impairs the republican form of government is undoubtedly because no one hitherto has thought such a contention even worthy of submission before the United States Supreme Court.

In view of the foregoing, it is quite unnecessary to make the point that the decision of the New Jersey court, on the record before it, is not, in the remotest sense, either the denial of a republican form of government or an impairment of the "orderly working" thereof.

Article IV, Section 4, of the United States Constitution not affording any warrant whatever for action by this Court, and that provision of the Constitution being the only one even adverted to in the petition or supporting brief, the application for certiorari should be denied.

IV.

The petitioner, Zink, has no personal, as distinguished from official, rights which can warrant his invocation of review by this Court of the judgment of the New Jersey Court of Errors and Appeals.

It is settled by prior decisions of this Court that among the limitations upon the right of this Court to review the judgment of the highest court of a state under Section 237 of the Judicial Code is the principle which requires those who seek such review "to have a personal, as distinguished from an official, interest in the relief sought and in the Federal right alleged to be denied by the judgment of the state court."

Smith v. Indiana, 191 U. S. 138;

Braxton County Court v. West Virginia, 208 U. S. 192;

Clark v. Kansas City, 176 U. S. 114;

Marshall v. Dye, 231 U. S. 250.

The judgment of the New Jersey Court of Errors and Appeals here sought to be reviewed is directed against the petitioner, Homer C. Zink, as Comptroller of the Treasury of New Jersey. He is therefore affected solely in his official, and not in his personal capacity. The application herein must, if for that reason alone, therefore, be denied.

The contention in the brief of petitioner that he is appearing as the *alter ego* for the State of New Jersey obviously begs the question as to whether the New Jersey statute, properly construed, did not impose upon him a mere ministerial duty to distribute certain moneys in the state treasury to various political subdivisions of the state. If it did, then,

under both state and federal decisions, the proceeding below was not an action against the state.

Haycock v. Jannarone, 99 N. J. L. 183;

Sommer v. State Highway Commission, 106 N. J. L. 26;

Empire Trust Co. v. Board of Commerce & Navigation, 124 N. J. L. 406, 410;

Board of Liquidation, et al v. McComb, 92 U. S. 531, 541;

Ex Parte Young, 209 U. S. 123;

Houston v. Ormes, 252 U. S. 469.

The New Jersey Court of Errors and Appeals has determined that the New Jersey statutes, properly construed, call for the exercise by the State Comptroller of the ministerial function of distribution of the moneys here in question to certain municipalities. The construction of the New Jersey statutes by the highest court of the state is, of course, conclusive upon this Court. It therefore follows that, for purposes of this application, petitioner must be considered to have been under a ministerial duty, in his official capacity, to take the action enjoined upon him by the judgment of the New Jersey court below. Therefore, his status, both in the court below and here, must be deemed as in his official capacity as Comptroller of the State of New Jersey, and neither as *alter ego* for the State of New Jersey, nor in his personal capacity. The State of New Jersey is not the petitioner here, directly or indirectly.

Under the decisions of this Court cited hereinabove, no review of the state court judgment can issue out of this Court upon the application of petitioner in such official capacity.

Conclusion.

It is, accordingly, respectfully submitted that the application for a writ of certiorari be denied.

Respectfully submitted,

CHARLES A. ROONEY,
Attorney for City of
Jersey City.

CHARLES HERSHENSTEIN,
MILTON B. CONFORD,
Of Counsel.

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FILED

JAN 24 1946

CHARLES ELMORE GROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1945

No. 737

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On Petition for Certiorari to the Court of Errors and
Appeals of New Jersey.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.

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Counsel for Petitioner.*

WALTER D. VAN RIPER,
*Attorney-General of New Jersey,
Of Counsel.*

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

We respectfully pray leave to submit this reply brief in support of petition for a writ of certiorari in the above-entitled cause.

The statement by the respondent (B. pg. 7) that the petitioner "urged that the decision of the Court *denied* to New Jersey a republican form of government" is incorrect. We have tried consistently to maintain the distinction set forth in our petition herein. Our argument before the New Jersey Court of Errors and Appeals on this point is set

forth on pages 5 to 8 of the petition for reargument.
(R. pg. 187-190)

SUMMARY OF ARGUMENT.

I. In reply to respondents' argument concerning the applicability of Article IV, section 4 of the United States Constitution.

(a.) Concerning the timeliness of the objection.

(b.) Concerning the applicability of Article IV, section 4 in any case.

II. In reply to respondents' argument concerning the status of the petitioner.

III. A review in the instant case would be in vindication and defense of the sovereignty of the people of the State of New Jersey.

ARGUMENT.

I.

In reply to Respondents' argument concerning the applicability of Article IV, Section 4 of the United States Constitution.

The respondent has argued that there is no power in this Court to review this judgment on the complaint of the petitioner that the action of the New Jersey Court of Errors and Appeals has in some manner violated Article IV, section 4 of the United States Constitution (a.) because the question was not raised below and (b.) because in any event the said article does not give this Court the power to review the judgment in question.

(a.) Concerning the timeliness of the objection.

It is apparent that the respondent has misunderstood the argument of the petitioner. The constitutional question raised before this Court is not separate and apart from the State constitutional questions raised in the first instance. We still insist that it was the violations of the State Con-

stitution which has made the judgment below a nullity and primarily those violations only. We urge that since the violations were in contravention of the government established by the people pursuant to the guarantee of the Federal Government, the Court of Errors and Appeals has by its action offended against the Federal Constitution or at least by its action has given this Court the power to review the unlawful, the unconstitutional, judgment—the said power being an incident of the guarantee afforded by Article IV, section 4 of the Constitution of the United States.

We urged below that, since the Court was called upon to determine whether or not there was an appropriation by the Legislature, such undertaking constituted a suit against the State. As we pointed out in the petition (pg. 3), the said Court, by the very question it propounded as being necessary of solution, (T. pg. 153) disclosed that the action did in fact constitute such a prohibited suit.

It remained, however, for the brief of the respondent to disclose with finality the vice of the whole situation. It is there made apparent that no one can discuss the result of this case without such disclosure. The respondent says at page 13 of its brief:

“The contention in the brief of petitioner that he is appearing as the *alter ego* for the State of New Jersey obviously begs the question as to whether the *New Jersey statute, properly construed*, did not impose upon him a mere ministerial duty to distribute certain moneys in the state treasury to various political subdivisions of the state.”

and at page 14:

“The New Jersey Court of Errors and Appeals has determined that the *New Jersey statutes, properly construed*, calls for the exercise by the State Comptroller of the ministerial function of distribution of the moneys here in question to certain municipalities.”
(Italics ours.)

Quite obviously the act of "properly construing" a statute to determine whether or not it has made an appropriation is a suit against the State because if one construction is placed upon the language, the money remains with the State—if the other, it belongs to a certain few municipalities. What more could be wanted to bring a cause within the sovereign immunity? It was to avoid just such situations that the rule of sovereign immunity has been developed. We have been able to find no instance and the respondent has referred to no case where, on similar facts, it has been held that the action did not constitute a suit against the State. The suggestion on page 14 of respondent's brief that the construction placed upon the act by the New Jersey Court is conclusive upon this Court presupposes jurisdiction. There is no such rule in a case where the Court was without jurisdiction and, where as in the instant case, its action constituted usurpation.

The Court below was fully informed concerning the defense of immunity from suit. Nevertheless it did take jurisdiction. By so doing it violated certain provisions of the New Jersey Constitution. It was the taking of such jurisdiction and the violating of the said Constitution which the people of the State of New Jersey now claim has given rise to certain rights that the State has as an incident to the guarantee of a republican form of government contained in the Article IV, section 4 of the Constitution of the United States. The quantum of such right we are frankly unable to determine because such question has never been answered. It certainly should extend sufficiently to authorize this Court to review the unauthorized judgment in order to determine whether such judgment does do violence to the New Jersey Constitution in a case where but for such remedy there would be no other orderly judicial method for review. It was the usurpation of the highest Court of New Jersey which we believe created a controversy arising under the Constitution of the United States.

We did not anticipate such usurpation. Nor do we believe that it is ever required that a litigant anticipate an unconstitutional act on the part of the Court itself. Nor could we assume that even if the New Jersey Court had known sooner that its violations of the New Jersey Constitution would be reviewable by this Court, the New Jersey Court would have acted otherwise. Any such assumption could only mean that the usurpation was conscious and deliberate. We make no such charge. It is with usurpation in the sense of its use in the law with which we are concerned—with the results and not the motives. In *ex parte Sawyer*, 124 U. S. 200, 221, the distinction between an absolute want of power and its defective use is clearly pointed out. In *Voorhees vs. Jackson*, 10 Peters 449, 474, this Court discussed the boundary between an error in judgment and the usurpation of power. It is with this distinction that we are presently concerned.

If there is a right in the State, as an incident to the guarantee of a republican form of government, to have the government so established given a certain degree of protection in a given case, then a Federal question has arisen by the unlawful action of the New Jersey Court of Errors and Appeals in the instant case, and the judgment, which is a nullity, may be set aside by this Court. The State has done all within its power to forestall the entry of the improper judgment and this appeal is timely.

(b.) Concerning the applicability of Article IV, Section 4, in any case.

The respondent (B. pg. 9) states that this Court has no jurisdiction under Article IV, section 4, in any event—that this “Court has no jurisdiction to adjudicate that state action of any nature violates the federal guaranty to the states of a republican form of government.”

We do not claim that the present situation presents “state action.” We claim it is usurpation and contrary to the constitutional grant of power to the Court of Errors and Ap-

peals. We have requested this Court to determine whether such action is violative of the said Article IV, section 4. The respondent has absolutely no authority for its broad assertions concerning the applicability of the said section because a case has never been reported which is similar to the instant case. In none of the cases reported was the Court reviewing an unconstitutional act of the State Court itself.

Had this question arisen during the period when Chief Justice Marshall delivered his monumental opinions, we have the feeling that this Court would have assumed jurisdiction. It is true that we have come a long way without the need of the rule proposed becoming apparent. But if the power existed at that time, it still remains today. Many powers heretofore unrealized still lie dormant in our great Constitution. As was said many years ago by the Chief Justice in *McCulloch vs. Maryland*, 4 Wheat, 316, 405:

“But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”

To repeat, we have been unable to find a single case where unconstitutional acts—usurpations by the Court itself—were involved and where there was presented the urgent need for a review by an impartial tribunal to declare a judgment predicated upon such unconstitutional acts a nullity. The need being present, the learned Justice who said in the same case at page 421:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

would surely have found that jurisdiction exists in the instant case. We do not advocate some new and revolutionary power. We respectfully suggest only that just as in *McCulloch vs. Maryland*, *supra* (pg. 411), it was found that the power to create a corporation was

“never the end for which other powers are exercised, but a means by which other objects are accomplished.”

so in the instant case, the rule which we advocate would aid in the orderly working of the republican form of government established by our people under the guarantee of Article IV, section 4, of the Federal Constitution. Nothing could be more logical than that the several organs of Federal Government should undertake to assist when the State Government so guaranteed fails to function properly because of a usurpation on the part of the judiciary. We repeat that the need is present—the remedy is in the best traditions of our judicial system. This Court without doing violence to any precedent could undertake that review.

Such review would not be an interference with State sovereignty. It would be in support of the integrity of that sovereignty and would prevent the will of the people from being thwarted. The usurpations—the unconstitutional acts are not the acts of the sovereign but in contravention of the sovereign will. A review of such acts being in support of the sovereign right to have its Constitution respected and held inviolate would lend strength to our constitutional system.

In *Marbury vs. Madison*, 1 Cranch 137, 176, the Chief Justice said:

“To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”

This is apt in considering the powers of the New Jersey Court under the State Constitution. But we go further and inquire what is the purpose of the guarantee of a republican form of government by the United States Constitution, if as in the instant case, where there can be shown a clear usurpation which will cause great damage to the State unless a remedy for review is found, this Court, the only possible forum for such purpose, is powerless to grant that review?

We believe we shall be able to demonstrate that this Court has the power to review the judgment in question. In conclusion of this point we refer to the closing remarks of the great Chief Justice in *Marbury vs. Madison*, *supra*, page 180. The author of such sentiments must have considered that the right of review existed in this Court in a situation such as is presented by the instant case.

II.

In reply to Respondent's argument concerning the status of the Petitioner.

In our original brief we stated that the petitioner in the instant case is the *alter ego* of the State of New Jersey. The respondent apparently takes the view that the State may never be a petitioner before this Court if it acts through its duly authorized officers and cites cases supposed to support such premise. None of such cases are in point.

In *Smith vs. Indiana*, 191 U. S. 138, an auditor sought to test the constitutionality of a tax act not because of any interest the State had in the matter but because of the alleged interest of individual taxpayers, who should have acted for themselves. He was not the *alter ego* of the State but an unauthorized champion of certain others.

Braxton County Court vs. West Virginia, 208 U. S. 192, and *Clark vs. Kansas City*, 176 U. S. 114, are similar to the *Smith* case. In *Marshall vs. Dye*, 231 U. S. 250, the Court was dealing with legislation providing for the submission of a new constitution. In none of these cases did the State

officers have a concern in the matter. Our case is altogether different.

The respondent urges (B. pg. 14) that this Court is bound by the result in the instant case. If we are correct in our assumption and this was a suit against the State, the judgment is a nullity and this Court is not so bound. In the latter event, as the result of such judgment, the Comptroller will be required to pay out a large sum of money which belongs to the State of New Jersey. In this present proceedings the petitioner appears as the *alter ego* of the State against which an improper judgment has been entered. A situation exists entirely different from that which arose in the cases cited by respondent and commented upon above.

The status of the parties is clearly set forth in the recent case of *Ford vs. Department of Treasury of Indiana*, 65 S. Ct. 347, 350, wherein Mr. Justice Reed said for this Court:

"We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayers*, 123 U. S. 443, 490, 499, 8 S. Ct. 164, 174, 175, 31 L. Ed. 216; *Ex parte State of New York*, 256 U. S. 490, 500, 41 S. Ct. 488, 590, 65 L. Ed. 1057; *Worcester County Trust Co. vs. Riley*, 302 U. S. 292, 296, 298, 58 S. Ct. 185, 186, 187, 82 L. Ed. 268. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Smith vs. Reeves*, *supra*; *Great Northern Life Insurance Co. vs. Read*, *supra*. We are of the opinion, therefore, that the present proceeding was brought in reliance on § 64-2614 (a) and is a suit against the state."

The judgment in the instant case is in effect against the State of New Jersey. For want of jurisdiction it is a nullity. The present petition has been filed on behalf of the State of New Jersey for the purpose of having this Court review and set aside such judgment under authority contained in the United States Constitution. The petitioner as the *alter ego* of the State is the proper person to make such petition because, in such capacity, he was sued below.

III.

A review in the instant case would be in vindication and defense of the sovereignty of the people of the State of New Jersey.

Chief Justice Marshall has drawn a clear distinction between the State as a government and the people of the State, who are the ultimate source of sovereignty. It is the people of the State to whom the Federal Government has guaranteed a republican form of government. When the Court of Errors and Appeals of New Jersey in the instant case usurped the powers of the Legislature, it did not offend against the Legislative branch but against the people and it is they who now seek an independent review of the unconstitutional acts to the end that the judgment resulting therefrom shall be declared to be a nullity.

In any such similar instance of usurpation, a fair and impartial review should be available. The rule proposed by the petitioner would provide such review and fill a present apparent lack in our governmental system. It will act as a deterrent upon future acts of usurpation by courts which would not otherwise be subject to review. Nor is it contrary to the theory of State sovereignty. Rather it is in justification of such sovereignty, for, remembering that it is the people and not the government which is sovereign, the rule proposed would assure a more perfect working of that government which the people have formed for the purpose of governing themselves. Thus we would have a check upon the other branches of our government by the State

Courts and upon the Courts themselves, not otherwise checked within our State Constitution itself, by review before this Court as an incident of the guarantee afforded to the people by Article IV, section 4 of the United States Constitution.

We must deny the unnecessary and discourteous statements of the respondent concerning the motives for the present appeal. (B. pg. 7.) We assure this Honorable Court that the petition was not filed for purposes of delay but in the earnest and sincere hope that the present action might result in establishing law that will make for a more orderly working of our governmental system. The distinction that we make concerning questions that have arisen under Article IV, section 4 of the Federal Constitution, are not illusory but fundamental and real. In cases heretofore considered the question was as to what constituted a republican form of government. It contemplated the future operation of the government. The action complained of went to the form of government itself, the complaint being that thereafter there would not be a republican form of government in operation. In such a situation, there was a political question involved. It was for Congress to determine whether it would recognize such changed government if, in fact, there had been a change.

But that is not our case. Our inquiry is not directed toward the form of government that will exist hereafter but rather with a breakdown in the operation of an existing government established by the people under the guarantee contained in Article IV, section 4 of the United States Constitution. The orderly operation of that government has been interfered with by an act of usurpation by the highest Court of the State. There is no method of review afforded by the State Constitution. Unless a review may be had before this Court, the State will suffer great loss. The people of the State have as an incident of the aforementioned guarantee requested a review of the wrongful acts to the end that their sovereignty may be maintained. If

permitted a review, the State will not only show the need for such a rule but the applicability of the rule proposed to the guarantee contained in Article IV, section 4 of the United States Constitution will be demonstrated.

In conclusion we point out that in the final analysis the people are sovereign. The people created our dual system to govern themselves—in order to form a more perfect union. The several agencies of the government so established may only act within the limits of their delegated authority. The Court of Errors and Appeals of New Jersey has exceeded those limits. The present review is in vindication and defense of the sovereignty of the people of the State of New Jersey.

CONCLUSION.

It is respectfully submitted that the application for a Writ of Certiorari should be allowed.

Respectfully submitted,

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